Contrast and Comparison of

Critical Legal Studies and Neo-Marxism

As Theories of Law and Economy

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A Critique of Adjudication [fin de siècle]

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The rationalism/irrationalism debate

In the "rationalism/irrationalism debate" in cls in the late 1970s and early 1980s, the systematizers argued that we could put the notion of legal indeterminacy to work to buttress systemic analysis of the role of law in capitalism. The "irrationalists" (left/mpm types) countered by deploying the minimalist internal critique of legal reasoning in the "viral" direction, arguing that far from supporting the systemic analysis, it decisively undermined it.[32]

I would put the leftist goals of the critique of adjudication, shared by systemic and left/mpm types, this way: to reveal the large role played by the legal system; to delegitimate the outcomes achieved through the legal system by exposing them as political when they masquerade as neutral; to show that they are in some sense unjust and that their injustice contributes to the larger injustice of the society as a whole; to be, thereby, a radicalizing force on those who read and accept the analysis; and to suggest ways that a radicalizing project should approach the task of making the system less unjust through political action.

The cls "science project" worked to show that really understanding leads in all these directions, within the general framework of the model of alienated powers developed by Feuerbach and Marx. The three parts of that model were to show *(a)* falseness of the theory that conventionally explains why things are the way they are, *(b)* sub rosa determination by something else, *(c)* the need to change to a new mode of determination through human agency according to a correct moral theory.

Systematizers and irrationalists collaborated on the first of these operations through the development and radicalization of legal realism. We attacked the false appearance of necessity by minimalist internal or (to my mind mistaken) global critique. We attempted to show that legal rules played a much larger role than generally supposed in producing the hierarchical, alienated world of our capitalism, and that these legal rules reflected ideological projects, or at least particular, contingent social visions, rather than an inner logic of law.

The second part of the science project involved developing theories of what really happens, and why, that bring to light both human agency and injustice, and showing that they can be causally attributed to "the system."

The notion went something like this: "We have this system as a matter of fact (of science). Having this system necessarily (because of science) requires that you have these conditions that according to our (nonscientific ethical system) are injustices. This knowledge is nonideological."

It was here that disagreement arose. Systematizers argued, plausibly, that the content and evolution of the legal system were in some sense responsive to the content and evolution of "society," so that law could be understood as a dependent variable. They also argued, plausibly, that the legal system performed a "function" in the social system, contributing to its content and evolution as well as reflecting it.

In the late 1970s, there were many extant versions of system among which to choose, including neo-Marxism, Weber's theory of law in capitalism, Parsonian structural/functionalism, and Habermas's theory of communicative action. Perhaps the single most common attitude was "post" in relation to these quite elaborated theories, but influenced by all of them. It seemed obvious that American society had gone through a series of stages, from an agrarian, supposedly individualistic, yeoman society, through industrialization, urbanization, and class stratification, toward a highly "interdependent" welfare capitalism dominated by large corporations and state bureaucracies. It seemed plausible that the legal system had responded to different needs and performed different functions in each period.[33]

The rationalism/irrationalism debate was about whether this intuition could be supported through legal scholarship. It focused on a particular version of system, what I will call the "neo-Marxist theory of law in capitalism," not because the participants were Marxists (a few had been), but because this theory seemed the most coherent and the most leftist. The critique applied a fortiori to the weaker versions of the needs and functions thesis, which I will describe in a moment.

A neo-Marxist social theory of law

A neo-Marxist social theory of law might go something like this. "We have a capitalist economic system. The capitalist system is based on private property in the means of production. If you don't have private property in the means of production, you don't have capitalism. If you have such a system, then it follows that you will have the following kinds of injustice and misery. These things are implicit in the system. They are therefore implicit in private property in the means of production.

"The role of judges is to enforce and interpret the laws that instantiate

the general concept of ownership of the means of production. They are part of the system. They are not a 'necessary' part but merely 'superstructural,' because even if there were no state apparatus and no rule of law, the capitalists could maintain control through the use of force within the base, or 'relations of production.' That is, they could coerce workers to accept the system through nonlegal means.

"But if judges did otherwise than interpret and enforce the rules that flow from the general concept of ownership, and got away with it, thereby changing fundamental relations between workers and owners, then we would have something different from capitalism. As long as they enforce these rules, we have capitalism and its attendant injustices.

"The rule of (capitalist) law is supremely *helpful* even if merely superstructural. Along with their administrative work of putting the system in operation at the practical level, judges produce an extensive legitimating discourse that is part of the ideology that pacifies people. Liberal legal theory dovetails with Liberal economic theory in representing the unjust outcomes of economic interaction as the consequence of 'free bargaining' among property owners (workers own their labor) whose factor endowments have different 'natural' values based on their social contributions. Judges form one of the ideological state apparatuses.

"Sure, some measure of marginal reform through the legal system is possible. There may be marginal gaps, conflicts, and ambiguities in the concept of property. And in order to maintain the plausibility of the ideological claim that (capitalist) law is neutral between social classes, judges will follow it against their class interests in some cases. For these two reasons, it is sometimes possible for the working class to win victories through the legal system. The legal system is 'relatively autonomous,' determined by the base only in the 'final instance,' and it is even possible to regard the rule of law as a 'universal human accomplishment.'

"But when it comes to the fundamental rules of the game, which are what guarantee the fundamental interests of the capitalist class, then the law itself is committed to capitalism. To change the basic legal rules of capitalism, the judges would have to go against the 'system' that protects their own class interests. But they would also have to go against the law itself, against their own oaths as judges."

In the fanciest form of this kind of theory, there is legal indeterminacy in the sense of social construction, but only at the abstract level: the commodity form and the legal form are homologous or identical or mutually syntonic. Once we have the legal form (of the commodity), the specific

rules of the legal system put capitalism into effect according to a determinate logic of the commodity.[34]

According to the theory, what is wrong with the system (injustice and misery) is a consequence of a basic, pervasive structure of the system, namely, its commitment to private property. Liberal reformism offers mere Band-Aids, overestimating what can be done with its moderate methods, while at the same time understating how bad things are. The positive social theoretical analysis is therefore leftist in the sense that it argues that only "radical" change can get us where "we" want to go. The only way to bring about "real" systemic change would be to have a system based on a different concept, and that requires the rulership of a different class.

The role of indeterminacy in the neo-Marxist theory of law

The critique of legal reasoning, whether in its legal realist or its cls version, at first seems to fit into this project, indeed to contribute mightily to it. It does so by extending the "false-necessity" critique of the "laws of economics" to the rules of the legal system. This extension makes it possible to incorporate a logic of legal change into the story of capitalism. If law is indeterminate *in its details,* as well as at the level of the choice of an abstract form, we can do a political analysis of judging and of the vast private law domain left to judges (on the Continent, left to "legal scientists").

Judicial law making practice can be fitted into the general left political analysis by making judges part of the strategic elite, furthering class interests or working out the logic of the system, rather than merely administering ("applying") capitalist legal concepts. We can interpret this work as that of constantly adjusting the whole corpus of specific legal rules to fit the interests of dominant classes in the successive stages of competitive and monopoly capitalist development. Competitive market capitalism has one set of legal needs, but monopoly capitalism has another. Judges make the needed changes through strategic manipulation of indeterminacy while maintaining the illusion of legal compulsion.

There is no necessary tension between the more "instrumental" and the more "structural" theories. Each stage (structure) might produce and be produced by a capitalist class whose instrumental interests correspond to that stage's development. The class will then appoint judges who choose, among the possible meanings of an indeterminate legal corpus, those

meanings (rules) that will promote the development of the stage and its dominant class.

De-Marxifying the analysis

This flexible version of capitalist economic development brought the neo-Marxist theory into surprising convergence with the liberal mainstream. Indeed, an analysis structurally similar to this one underlay just about all of the sociology of law, as it developed after World War II, at least to the extent that it was influenced by legal realism and had social theoretical ambitions (as opposed to strictly positivist, empirical, behaviorist, or number-crunching ones).

There was an apologetic version, which had the same stages but no notion that capitalism was defined by "relation to the means of production." This version employed the logic of economic growth, rather than of capital accumulation; it was steered by democratically chosen policy makers who were more or less wise about the public interest, rather than by the ruling class. The outcome was a prosperous open society with some serious problems, rather than exploitation.[35]

In between, came the progressive historians' version, derived from Charles and Mary Beard and Vernon Parrington, with a soupçon of Marxism and a large dose of legal realist nihilism. In this version, law had exactly the same functions and served exactly the same needs as in the other two theories, but there was much more emphasis on the way elites manipulated the process to serve their own interests than in the apologetic version, and much less interest in the analytic systematicity of the process than in the neo-Marxist version.[36]

The role of the critique of adjudication in all of these approaches is strictly limited: it is to loosen law up just enough so that it can be the instrument of a developing rather than a static capitalist system. It is made pliable, or internally contradictory, or fluid, but only just enough for something outside it to give it new shapes through time.

The initial form of cls (as opposed to legal realist) internal critique, the mode of "contradiction," fit this role particularly well, though it is important that those of us who developed it were hostile[37] or ambivalent[38] toward the base/superstructure analysis of the neo-Marxists. We showed that there were two "models" or "visions" or "forms of consciousness" that could be teased out of the mass of legal materials in a given doctrinal area.[39] This innovation lent itself to cls theoretical developments with only analogical ties to the neo-Marxist analysis.

There were different versions of the internal structure of doctrine in different fields, but the point was that fields had internal structure. One use of the conflicting elements was as building blocks to which you could hook up antagonistic class interests, in the neo-Marxist theory or in some softer version. But there were other axes of conflict, as well, race and gender conflict, for example, and other types of theory, theories of patriarchy or of racial domination, for example, to which they might be hitched.[40] At the same time, one could interpret doctrinal development at a much lower level of abstraction as the playing out of conflict between specific groups within the elites, or between conflicting normative orientations much more specific or more "philosophical" than that between capitalism and socialism.[41]

This was easy to understand as left analysis. On the model of traditional ideology-critique, determination by law's autonomous force or by democratic legislative will—or the derivation of law from a few universally accepted ideals or natural rights—is revealed as mystification. Determination by something at once more human and less savory is revealed. And there is an explicit or implicit appeal to "people" to take advantage of this revelation of freedom and oppression to change things for the better.

The irrationalist critique

The rationalism/irrationalism debate in critical legal studies was about whether the exposure, first, of law's powerful distributive effect and, second, of the simultaneously structured and plastic character of legal reasoning, could be put to the uses of left theory at a more ambitious level. The issue was *not* whether the discourse was structured and influential; that was common ground. It was not whether it was useful in understanding doctrinal change to see it as the working out of conflicting political, economic, social, and purely ideal ethical projects; that was common ground. And it was not whether the judges and doctrinal writers who "froze" these projects into positive law, understood to have a nonideological origin, had the political effect of bolstering the status quo.[42] That too was common ground, though with disagreement over how important the legitimating effects really were.[43]

The disagreement was over whether there was a higher level of abstraction at which one could understand all of this in terms of the system, its "logic," its stages, its structure (as opposed to the lower-level structures of doctrine), its needs, and "the" function of law within it. The issue was the "actual" (as opposed to mystified) link between law and economy, the

second step in traditional ideology-critique. The stakes concerned whether an internally structured, but plastic, legal regime was determined in some sense by the economy, or some other social system, such as patriarchy or racial supremacy. For these purposes, progressive historians, post-neo-Marxists, some critical race theorists, and some feminist theorists of patriarchy constituted a coalition of systematizers.

The irrationalists simply abandoned—walked away from—the claim that the models or visions or forms of consciousness that coexist or succeed each other in legal thought are linked to changes in the economy or the society in any readily intelligible way.[44] The internal structures of the models and their sequencing were asserted to be good descriptions of reality, but only of the reality of textual structure. The link with extant stage theories was problematized, and no new theory was proposed in their place. The historical drama became that of the "death of reason," or the loss of faith, first in law's autonomous rationality, and second in the economy's autonomous rationality, played out in the arena of group conflict with local stakes, rather than the drama of capitalist development.[45]

There were three different critiques of the systematizers' left project that justified the abandonment of the stronger claim. Note that two of these are classic examples of minimalist internal critique, applied now not to legal reasoning but to the notion of a logic of the relations of production. The third was analogous to the "incompleteness" mode of legal critique: "I can write an opinion on the losing side that is just as plausible as yours for the majority."

The first internal critique was of the base/superstructure distinction. The definition of the economic formation that supposedly determined the "legal needs of capitalism" that the judges fulfilled through manipulation included the very legal terms (property, labor, contract, commodity, wage) that the judges were interpreting in the course of making new legal rules. Each alternative legal definition of property, contract, commodity, and so forth, therefore meant a different definition of the base. It would be reasoning in a circle to define the base in terms of the legal rules that supposedly met its needs.[46]

This idea of law as "constitutive"[47] was, mutatis mutandis, just as threatening to progressive functionalist accounts as to the neo-Marxist ones, although none of the former would have been caught dead making a base/superstructure distinction. The needs and functions they attributed to society and to law, respectively, were hopelessly vague rather than hopelessly specific. If one took the needs and functions seriously, it appeared that

there were many legal regimes that might have done the job. These regimes would have produced wildly different distributive outcomes and indeed wildly different economies.[48]

The second internal critique was of the distinction between capitalist and socialist law. Once it is acknowledged that legal rules define the "base," we can ask about the "logic" of these rules. (1) Hohfeld's analysis shows that "property is just a bundle of rights," with no "core"; there are an infinite variety of particular private law regimes each of which will produce a different allocation of resources and distribution of income, all fully consistent with any coherent definition of private property.[49] (2) Socialism, in the form of collectivist, altruist, egalitarian values, is already present in the capitalist legal system, and just as much within the supposedly Liberal individualist core of private law doctrine as in the social democratic regulatory add-ons.[50]

(3) Modern mixed capitalist legal regimes have no overall system logic: each is an internally inconsistent hodgepodge of "social" and "individual" elements with conflicting valences.[51] This was also true of communist regimes, which couldn't operate the vague abstraction "state ownership of the means of production" without elaborating internal rules of decentralization that functioned the way the law of the commodity functions in capitalism.[52] (4) Rather than a distinction between reform and revolution, there is a mushy continuum between collectivism and anarchism, hierarchy and equality. There aren't even any privileges among places to struggle ("bourgeois dinner parties are sites of resistance," and so on).[53]

The third critical move was to argue that the proponents of a (rationalist) left legal theory, whether in the neo-Marxist or the progressive historical mode, couldn't produce a logic of economic development that was any more than an ex post description of the consequences of particular ruling-class legal strategies. Is there a way of using the insight that different possible legal rules lead to different economic outcomes, to show that a given legal regime promotes capital accumulation (economic growth, production), or some set of class interests?

Since the systematizers didn't have much in the way of an actual theory of the logic of capital, or the needs of monopoly capital, or whatever (I say this respectfully—after all, we irrationalists didn't have one either), a good part of the debate took place in the critique of efficiency theory, a closely analogous but right-wing form. The critical line was that efficiency, as defined by economists, just doesn't produce clear answers to the question

what rules will maximize consumer welfare, let alone a dynamic theory of welfare over time.[54]

It followed that the left-wingers couldn't employ the concept of a "subsidy" through legal rules to organize a theory about how a "dominant class" can use the legal system to promote its interests, or economic growth, or capital accumulation. The problem was the absence of a neutral economic baseline (which would replace a now impossible neutral legal baseline). There was no point from which to measure the subsidy.

It might be true that the actual legal actors involved all *believed* that a particular rule or rule change was necessary (or just desirable) to protect class interest or the accumulation process. And it was often possible to show plausibly and concretely how particular interests might gain or lose from a particular rule choice.[55] But the extant attempts to demonstrate the connection between legal and economic variables at the much more abstract level of "capitalism" or economic growth were either no good internally (see the critique of cost-benefit analysis), ignored counterinstances (where the wrong class adopted the legal program in question, or the right class adopted the wrong legal program), or were open to the formulation of an equally plausible but ignored counterstory (in which the economic effects of legal change were plausibly predicted to be just the reverse of those asserted).[56] All the systematizers could show was ruling-class strategies, adopted under conditions of practical and analytic uncertainty, justified by phony appeals to economics, and then critiqued by the left using equally phony but politically opposite appeals to economics.

As in the critique of legal reasoning, the strictly internal critique was different from the "incompleteness" critique that showed that you could construct alternative, equally plausible arguments for opposite results. "Yeah, but that rule change might have *hurt* the ruling class; that rule might have *impeded* capital formation, indeed probably actually did hurt and impede, for all you can show, given this alternative version of the facts."

This kind of argument, as we saw in Chapter 4, is less logically tight than strictly internal critique. It leaves the field open to determined showings that in fact the effects were indeed x or y, and to endless attempts to qualify the systematizers' claim just enough to meet the critique without losing all scientific power (see the debate about "tilt" as a substitute for the "logic of capital").[57] There's no way to prove that someone won't soon come up with a totalizing theory that works.

But until someone does comes up with one, the Pink Theory rejects

(walks away from, "parks") the whole model of an internally indeterminate legal discourse determined by external facts or structures (the needs or stages of the economy). This is one of the postmodern elements in the PT, though it's odd to call it that, because it was present before any of us had heard of postmodernism.

Be it noted that giving up on the idea of a base whose structure determines legal rules does not mean giving up on establishing a connection between legal rules and their social, economic, and political context. When we find that the discourse of legal justification is internally contradictory in ways that *sometimes* render it plastic, open to ideologically oriented legal work, we try to increase our understanding by "going deeper" (just as the systematizers do), by appealing to ideology, in the vulgar sense of liberalism and conservatism. Isn't this the same old model of outside determination? No, it is not, for reasons already elaborately canvassed:

> *(a)* Liberalism and conservatism, understood as discursive systems, as ideologies, are inside rather than outside legal discourse itself; legal and political versions of liberalism and conservatism are mutually constitutive.
> *(b)* When judges choose, "for ideological reasons," which way to move within their contradictory discourse, the liberalism or conservatism that motivates them is not only internal to law but also no more (and no less) determinate or internally coherent than the formal discourse they inflect.
> *(c)* Within the opposing sides in the legal argument there are opposing sides in an ideological argument, and within them antagonistic character types and within them opposed cultural styles and within them . . . opposed modes of legal discourse. There is a circle or an infinite regress, in which there is never a determining outside discourse or fact but a series of never final unveilings. If we're lucky, we get knowledge with enough bite so that we want it before we have to decide how to act, though not enough bite to tell us how to act.
> *(d)* Although "outside" factors influence adjudication, they do not impose on it an outside "logic." The first reason for this is, as just stated, that they do not determine the rules judges make, in any ordinary sense of the word "determine." The second reason is, as we irrationalists argued against the systematizers, that neither the economic base nor patriarchy nor racial supremacy has any more internal coherence, any more "logic," than the process of legal reasoning from the extant materials.

Contrast with neo-Marxist theories of ideology

After the theory of "determination in the final instance," the second most important element in the neo-Marxist theory of law is the theory of legitimation through ideology. This is an important element in the "output" side of the theory, the part about how law affects society (external determination being the "input" side). As I mentioned above, the Pink Theory is a variant, a chastened version of this theory.

Writers in the Marxist tradition, such as Georg Lukacs,[58] Gramsci,[59] and Althusser,[60] and also Jürgen Habermas,[61] have used the term "ideology" to describe what I have been calling "Liberalism" (belief in majority rule, rights, the rule of law, and some version of a regulated market economy with safety nets).[62] In the classic analyses, it is ideology in this sense that legitimates. This usage is closely linked to the notion of a logic of the economic formation and is quite different from the use of the term in the Pink Theory.

To identify ideology with American liberalism and conservatism is to adopt a different definition of the word, and a weaker theory, than Marxists have typically wanted to develop and deploy in their accounts of capitalism. A strong version of ideology, which I will call "Ideology" (capitalized), has four characteristics.

(a) Ideology is an interpretation of reality that is either consciously or unconsciously shared across the whole social and political spectrum; specifically, it is something "deeper" than the "surface" disagreements that mainly preoccupy actors in those areas. Thus a common belief in God underlies religious sectarian conflict, which looks to the participants to be a matter of salvation and damnation. Thus a common belief in the naturalness, justice, and efficiency of private property in the means of production underlies political conflicts between liberals and conservatives that seem to them to involve basic questions of social justice.

(b) There is something behind Ideology, something that is not itself Ideology, that causes or explains it, and thereby indirectly causes or explains Ideology's effects. The something is the forces and relations of production, or the needs of capitalism at a particular stage, "the base." The play of intense surface conflicts within Ideology reflects divisions in the base. While there may be feedback from the ideological to the material domain, a strong version of Ideology privileges the material. "In the final instance," the base trumps the superstructure, or the theory is not a strong one.

(c) Ideology legitimates the structure of forces and relations of production that causes or explains it. To legitimate, in this context, means to persuade people to accept the overall social order founded on the underlying economic structure, rather than to persuade people that particular actions are right or wrong. Legitimation is Ideology's function in the social order seen as an integrated totality, or at any rate its effect. The legitimating effect of Ideology is more important than the various effects that flow from the disagreements within it that seem so important to the participants.

(d) Ideology is demonstrably false. That is, we can appeal to widely agreed on criteria of truth and falsity to show that it doesn't work as an interpretation of reality. Both the arguments for the existence of God and those for the natural justice of capitalism are tissues of contradiction. By contrast, the theory of the structure of capitalist society, and of the laws of its development, are "scientific" in a quite strong sense.[63]

Note that in this type of theory, Ideology, a singular noun, is the product of the underlying structure of economic forces and relations, which it legitimates, whereas in the common parlance of American political culture, there are many ideologies linked to a variety of economic interests. For the reasons discussed in Chapter 3, I've chosen this usage of the word, rather than the Marxist one.[64]

Liberalism and conservatism are not Ideology in the Marxist sense.

(a) Neither is shared across the society, and indeed the conflict between them is just the kind of surface phenomenon that the classical theory tries to get beyond.

(b) There is nothing more substantial behind them than an ideological intelligentsia with more or less definite ties to a "community" with some definition of its own "interests," at the same time that the intelligentsia has interests of its own that diverge from those of the represented groups. The interests are as much a function of the ideologies as vice versa.

(c) Liberalism and conservatism are "universalization projects" of intelligentsias that claim to represent particular group interests, rather than "the" legitimation mechanism for a particular type of society.

(d) Each is contested, both by its semiotically defined opposite number and by Marxism, anarchism, fascism, and Manchesterism, but there seems little prospect that either will be "proved false" in any definitive way. In my scheme, there is no "scientific" alternative to life as an ideologist.

But what about Liberalism (capitalized)? The Liberal conception of the rule of law, and the denial of the ideological in adjudication, are widely

shared across the political spectrum, like Ideology in the Marxist analysis. Moreover, I have been arguing that attempts to establish the coherence of the Liberal conception, to show that adjudication is or plausibly could be nonideological, have failed. The denial of ideology in adjudication is a response to the incoherence, so that we are dealing with something closely resembling "false consciousness."

In the Pink Theory, adjudication disposes of the stakes of ideologized group conflict by defining the rules of the game, and the presence of ideological motives in adjudication is mystified by its representation as neutral, impersonal, or objective, so that judges and their audience are in bad faith (rather than simply deluded). Contrasting this kind of regime with the counterfactual situation of effective legislative control of all law making generates the moderation, empowerment, and legitimation effects. For this reason, the Pink Theory belongs to the same family as the classic Feuerbach/Marx theory of alienated powers, as well as to the larger family of Marxist ideology theories.

Moderation and empowerment effects have to do with the evolution of liberal/conservative conflict within a regime where there is a lot of mystified judicial law making. This part of the analysis uses the non-Marxist notion of ideology, in the sense of liberal and conservative universalization projects, and suggests how the Ideology of Liberal legalism affects their fates as political movements.

In the legitimation effect, the mystified discourse of judge-made law in general, and numerous specific discourses explaining particular legal regimes, contribute to the naturalization of existing social relations of domination (hierarchy, inequality, alienation). Both the general and the more particular discourses contribute to naturalization by making it appear that background rules that are "really" the product of judicial ideological strategy flow instead from merely technical reasoning.

Naturalization is an Ideological effect because proposals for change that are outside the liberal/conservative "mainstream," as it defines itself in relation to the "extremes," seem, to the participants in political culture, less plausible than they would in a more transparent system. (By "transparent" I mean less mystified by the denial of the ideological in adjudication.) In other words, these nonmainstream alternatives are "cognitively"[65] excluded from consideration as impractical, rather than excluded on the basis of consideration on the merits. (By "on the merits" I mean without the mystifying effects of bad faith and denial.)

The Pink Theory differs from the Marxist analysis in the following respects.

Law's influence on society: What is legitimated is the status quo, rather than capitalism or the relations of production understood as a structure. The status quo is an incoherent hodgepodge of heterogeneous elements, without a system logic. Whatever it may be at any given moment, that's what gets naturalized by the denial of the ideological element in judicial law making. In this respect, the analysis is closer to populism than to Marxism. It points to the distortion of the results that would occur under a more transparent law-making process, rather than to necessary functions of the legal order in a particular kind of regime.

Society's influence on law: Neither liberalism and conservatism, nor Liberal legalism (the rule of law with denial of the ideological in adjudication), is caused or explained by the deep structure of capitalism. To repeat, the PT denies that any such deep structure has been plausibly demonstrated. Liberal legalism serves the status quo, not a deep structure, but is derived from it only in this sense: I allege that liberal and conservative judges and legal theorists share an apologetic motive that influences their descriptions of adjudication in general and of legal regimes in particular.

That motive is to defend the status quo against the extremes. Denial and bad faith with respect to the ideological in adjudication are *in part* a half-conscious strategy designed to represent judicial institutions and particular legal regimes as internally coherent and also just, when they are better understood as the opposite (from my heavily ideological, "extreme" perspective, of course).

In the article on Blackstone's *Commentaries* that I mentioned in Chapter 3, I characterized Blackstone's proto-Liberal project as apologetic in this sense but also as "utopian." I would say the same about modern Liberal legalism. The notion of utopian aspiration is implicit in what I have been calling the "abstract normative element" in liberalism and conservatism, that is, in their commitment to social transformation in the direction indicated, however ambiguously, by the body of Liberal principles and texts (rights, majority rule, the rule of law, a regulated market with safety nets, Judeo-Christian morality).

The idea of apology is the dark side of the idea that the ideologists are committed to the interests of the groups they represent. An ideology, seen as the universalization project of an intelligentsia, "mediates" between the utopian (abstract normative) element and the apologetic (interest-based)

element. To say that Liberal legalism is apologetic is to say that as a matter of fact, rather than of analytic necessity, the liberal/conservative center has been concerned to present the status quo as better than what the extremes have to offer, in part because liberals and conservatives benefit from the status quo by comparison with the extremes.

But it is to say more than that—that the apologetic motive or intent has inflected Liberal representations of legal institutions and regimes, falsifying or distorting the analyses. The particular form of distortion, or motivated error, is the denial of the ideological in adjudication and of the contradictory nature of the legal regimes produced by judicial law making. I mean to attribute a disreputable motive, albeit a half-conscious one, for this distortion.

The PT as "chastened" left theory

What this perhaps overly intricate theoretical model adds up to is an account of adjudication as the locus of liberal and conservative ideological projects with distributive effects, and an account of Liberal legalism as denial and bad faith with utopian and apologetic motives and legitimating effects. If it is convincing, it establishes, in Alan Hunt's words, a "connection between doctrine and its historical context" of the type that "critical theory promises."[66]

But it is a much weaker, more contingent connection between two much less coherent entities (a deconstructed status quo and a deconstructed legal regime) than the Marxist analysts originally hoped for. A theory of this kind may delegitimate the existing order in terms of its own theory of itself, and it may suggest ways in which the institution of adjudication plays a stabilizing role in our particular kind of capitalism. But it actually reduces our ability to "understand" the system in the traditional leftist sense of reducing its operation to laws or grand tendencies. Indeed, the critique of law, in the mode I am proposing, has the effect of making it implausible that we will be able to establish a relatively parsimonious explanatory paradigm to undergird the leftist project.

It seems to me unlikely that the left will succeed in finding a strong alternative to a weak version of this general type. I think the best we can or should hope for is the kind of chastened theory contained in this book. But it is worth noting that the rationalism/irrationalism debate within cls, which seemed at the time to be grappling with issues that were basic

to Marxist, Weberian, Parsonian, and Habermasian social theory, has had virtually no resonance beyond the narrow confines of the left legal academy.

The "hypercritical" character of irrationalism

The irrationalist attack on the systematizers' left theory doubled the use of the minimalist internal critique of legal reasoning: law is plastic in the sense that it could have been shaped in two or more ways; but the theories that are supposed to give definition to a plastic legal body fall to the very same internal critique that had loosened law up in the first place. The internal critique gets applied, directly when the theory includes legal concepts, and by analogy when it doesn't, to the implicit or explicit theories of the logic of capital that were supposed to explain law. Internal critique becomes a colonizing force in its own right, rather than a condition permitting colonization of legal by economic theory.

This kind of viral progression is something we will see happening over and over again in the evolution of the theory debate. Right from the start, it produced a political critique: indeterminacy theory was "going too far" if it deprived us of our ability to produce not just "covering laws" but any meaningful generalizations at all. Internal critique would become a demobilizing force if its argument was that history was just one damn thing after another. Moreover, it tended to support interest-group pluralism, in which groups have strategies that they pursue within a "process" framework, with no overall logic of the system. Interest-group pluralism was associated with legitimation of the status quo by "rules of the game" and was therefore clearly a bad thing.

The issue didn't go away and still hasn't. The code words are: "What we need is a general theory. You can't beat something with nothing. It's easy to critique—the hard part is to create a theory. The critical project is finished; now it's time for reconstruction." The danger of sliding into liberalism or pluralism, the loss of the sense that theory can orient practice, and the fear of the demobilizing effect of indeterminacy, contextualism, complexity, and contradiction, are still major themes of discussion. So is the idea that the critique "proved too much" and couldn't be right, because it would make *all* knowledge impossible (see Chapter 14).

Critics of cls from the right have exulted in the "lack of" or "failure to develop" a general cls theory,[67] for much the same reason that some cls people themselves have lamented it. "Outsiders" (not American legal ac-

ademics) who want to be sympathetic sometimes say they would be able to be sympathetic if only there were a general theory. Among us middle-aged white males, there are only a few participants in the debate (I'm one of them, most of the time) who don't feel ambivalence, or at least nostalgia, in regard to the "abandonment of totalizing theory." The situation in the later white male generations, and among white feminists and critical race theorists is more complicated.

In retrospect, the rationalist/irrationalist debate appears to have been the beginning of the legal version of the general intelligentsia's debate about whether postmodernism is "inherently" or "tendentially" conservative, and maybe psychotic to boot. It began in cls before most of us had heard of postmodernism, and it ran out of steam not because one side or the other won, but because, as in any narrative, "something happened." What happened was the "rights debate," to which we now turn.

32. What follows is an account of an actual debate, carried out over four or five years at conferences and summer camps. The account is no doubt seriously defective as history because of the vagaries of memory and the distorting influence of narcissistic investment. The debate was only partly reflected in the writings of the participants I refer to in the course of the narrative.

33. Morton Horwitz, *The Transformation of American Law, 1788–1860* (Cambridge, Mass.: Harvard University Press, 1977); Karl Klare, "Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness," 62 *Minn. L. Rev.* 265 (1978); Peter Gabel, "Intention and Structure in Contractual Conditions: Outline of a Method for Critical Legal Theory," 61 *Minn. L. Rev.* 601 (1977); Mark Tushnet, "A Marxist Analysis of American Law," 1 *Marxist Perspectives* 96 (1978); Trubek, "Complexity and Contradiction"; Jay Feinman and Peter Gabel, "Contract Law as Ideology," in *The Politics of Law: A Progressive Critique,* ed. David Kairys (New York: Pantheon Books, 1982).

34. Evgeny Pashukanis, *Law and Marxism: A General Theory,* trans. Barbara Einhorn (London: Ink Links, 1978); Isaac Balbus, "Commodity Form and Legal Form: An Essay on the 'Relative Autonomy' of the Law," 11 *Law & Soc'y Rev.* 571 (1977).

35. Willard Hurst, *Law and the Conditions of Freedom in the Nineteenth Century United States* (Madison: University of Wisconsin Press, 1956).

36. Lawrence Friedman, *A History of American Law* (New York: Simon and Schuster, 1973). For the neo-Marxist critique, see Mark Tushnet, "Perspectives on the Development of American Law: A Critical Review of Friedman's 'A History of American Law,'" 1977 *Wisc. L. Rev.* 81.

37. Duncan Kennedy, "Form and Substance in Private Law Adjudication," 89 *Harv. L. Rev.* 1685 (1976); Unger, *The Critical Legal Studies Movement.*

38. Horwitz, *The Transformation of American Law.*

39. See Chapter 4 and the sources cited in Chapter 4, n. 16.

40. For example, Alan Freeman, "Legitimizing Racial Discrimination through Race Law: A Critical Review of Supreme Court Doctrine," 62 *Minn. L. Rev.* 1049 (1978); Alan Freeman, "Antidiscrimination Law: A Critical Review," in *The Politics of Law: A Progressive Critique,* ed. David Kairys (New York: Pantheon Books, 1982); Frances Olsen, "The Family and the Market: A Study of Ideology and Legal Reform," 96 *Harv. L. Rev.* 1497 (1983).

41. For example, Gerald Frug, "The City as a Legal Concept," 93 *Harv. L. Rev.* 1057 (1980); Mark Kelman, "Interpretive Construction in the Substantive Criminal Law," 33 *Stan. L. Rev.* 591 (1981); William Simon, "Visions of Practice in Legal Thought," 36 *Stan. L. Rev.* 496 (1984); William Simon, "The Invention and Reinvention of Welfare Rights," 44 *Md. L. Rev.* 1 (1985).

42. Robert Gordon, "Unfreezing Legal Reality: Critical Approaches to Law," 15 *Fla. St. L. Rev.* 195 (1987).

43. Hyde, "Legitimation"; Crenshaw, "Retrenchment."

44. Some examples of the underlying attitude I'm talking about are Alan Freeman, "Truth and Mystification in Legal Scholarship," 90 *Yale L.J.* 1229 (1981); Mark Kelman, "Trashing," 36 *Stan. L. Rev.* 293 (1984); Duncan Kennedy and Peter Gabel, "Roll Over Beethoven," 36 *Stan. L. Rev.* 1 (1984).

45. Duncan Kennedy, "The Structure of Blackstone's Commentaries," 28 *Buff. L. Rev.* 205 (1979); John Nockleby, "Tortious Interference with Contractual Relations in the Nineteenth Century: The Transformation of Property, Contract, and Tort," 93 *Harv. L. Rev.* 1510 (1980); Kenneth Vandevelde, "The New Property of the Nineteenth Century: The Development of the Modern Concept of Property," 29 *Buff. L. Rev.* 325 (1980); James Kainen, "Nineteenth Century Interpretations of the Federal Contract Clause: The Transformation from Vested to Substantive Rights Against the State," 31 *Buff. L. Rev.* 381 (1982); Joseph Singer, "The Player and the Cards: Nihilism and Legal Theory," 94 *Yale L.J.* 1 (1984).

46. Kennedy, "Blackstone's Commentaries," pp. 362–363, n. 56; Duncan Kennedy, "The Role of Law in Economic Thought: Essays on the Fetishism of Commodities," 34 *Amer. Univ. L. Rev.* 939 (1985).

47. Karl Klare, "Law Making as Praxis," *Telos,* Summer 1979, 123.

48. Robert Gordon, "Critical Legal Histories," 36 *Stan. L. Rev.* 57, 110–113 (1984).

49. W. N. Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning," 23 *Yale L.J.* 16 (1913). See Joseph Singer, "The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld," 1982 *Wisc. L. Rev.* 975.

50. Kennedy, "Form and Substance"; Duncan Kennedy, "Paternalist and Distributive Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power," 41 *Maryland L. Rev.* 563 (1982).

51. Duncan Kennedy and Frank Michelman, "Are Property and Contract Efficient?" 8 *Hofstra L. Rev.* 711 (1980); Kennedy, "Role of Law." See generally the discussion of "contradictionism" in Chapter 4, particularly n. 16.

52. Leopold Specht, "The Politics of Property: Soviet Property as a Bundle of Rights," unpublished S.J.D. thesis, Harvard Law School, Cambridge, Mass., 1994; J. Kornai, *The Socialist System: The Political Economy of Communism* (Princeton: Princeton University Press, 1992), p. 226.

53. Kennedy, "Role of Law"; Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy: A Polemic against the System* (Cambridge, Mass.: AFAR, 1983).

54. Duncan Kennedy, "Cost-Benefit Analysis of Entitlement Problems: A Critique," 33 *Stan. L. Rev.* 387 (1981); Kennedy and Michelman, "Are Property and Contract Efficient?"; Kennedy, "Role of Law."

55. See, for example, Robert Steinfeld, *The Invention of Free Labor: The Employment Relation in English and American Law and Culture, 1350–1870* (Chapel Hill: University of North Carolina Press, 1991), ch. 6; Richard Abel, "Why Does the A.B.A. Promulgate Ethical Rules?" 59 *Tex. L. Rev.* 639 (1981).

56. The progenitor of this kind of analysis was David Trubek, "Max Weber on Law and the Rise of Capitalism," 1972 *Wisc. L. Rev.* 720.

57. For example, Morton Horwitz, *The Transformation of American Law, 1870–1960: The Crisis of Legal Orthodoxy* (New York: Oxford University Press, 1992), ch. 3. But see Mark Hager, "Bodies Politic: The Progressive History of Organizational 'Real Entity' Theory," 50 *Univ. Pitt. L. Rev.* 575 (1989). See also Wythe Holt, "Tilt," 52 *Geo. Wash. L. Rev.* 280 (1984).

58. Georg Lukacs, "Reification and the Consciousness of the Proletariat," in *History and Class Consciousness: Studies in Marxist Dialectics,* trans. Rodney Livingstone (Cambridge, Mass.: MIT Press, 1971).

59. Gramsci, *Prison Notebooks.*

60. Althusser, "Ideology."

61. Jürgen Habermas, *Legitimation Crisis,* trans. Thomas McCarthy (Boston: Beacon Press, 1975).

62. On the fascist version of ideology-critique, see "Carl Schmitt Meets Karl Marx," in William Scheuerman, *Between the Norm and the Exception: The Frankfurt School and the Rule of Law* (Cambridge, Mass.: MIT Press, 1994).

63. English neo-Marxist legal sociology has gradually abandoned all four of these ideas, as Alan Hunt proudly explains in *Explorations in Law and Society: Toward a Constitutive Theory of Law* (New York: Routledge, 1993), pp. 117–138, without, so far as I can see, adopting any alternative conception. Sic transit . . .

64. The intellectual genealogy of the popular American usage includes the writers who developed the critique of "totalitarianism" (see Abbot Gleason, *Totalitarianism: The Inner History of the Cold War* [New York: Oxford University Press, 1995], for whom not Liberalism but communism and fascism are the quintessential examples), the intellectual/historical tradition represented by Karl Mannheim, *Ideology and Utopia: An Introduction to the Sociology of Knowledge* (New York: Harcourt, Brace, 1936), and the "critical" line of thought, stemming from German idealism and very much present in Western Marxism (for example, Karl Korsch, *Marxism and Philosophy,* trans. F. Halliday [New York: Monthly Review Press, 1970]) that emphasizes the impossibility of operating without some inevitably partial cognitive framework.

65. Mark Kelman, *A Guide to Critical Legal Studies* (Cambridge, Mass.: Harvard University Press, 1987), p. 269.

66. Hunt, *Explorations,* p. 154. This formulation is meant to be responsive to Habermas's brilliant critique of structural Marxist theories in *Knowledge and Human Interests,* trans. Jeremy Shapiro (Boston: Beacon Press, 1971).

67. For a great collection, see Michael Fischl, "The Question That Killed Critical Legal Studies," 17 *Law & Soc. Inquiry* 779, 781–782 (1992).